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Supreme Court of the United States

No. 472

THE UNITED STATES OF AMERICA for the Use and Benefit of BROWNE & BRYAN LUMBER CO. INC.,

Plaintiff-Respondent,

against

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Defendant-Respondent,

and

OVE GUSTAVSSON CONTRACTING CO. INC.,

Petitioner and Intervenor-Appellant.

PETITIONER'S REPLY BRIEF

ANTHONY B. CATALDO,
Attorney for Petitioner,
1 Cedar Street,
New York, New York.

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Statement

Summarizing respondent's brief in opposition to the petition for certiorari, it is found that its arguments are not based upon the points made by petitioner, but instead it sets up its own so-called "questions involved" and then says that such do not require the grant of the petition. It also continues the art it employd in the lower court, which was so successful, of confusing the specifics with the general and vice versa and adding to the confusion by calling petitioner names. This tends to create a false aura of injury to respondent. It even argues that petitioner's claims of error are erroneous because the lower courts have said so (see pp. 18 and 19 of resp. brief).

It would perhaps be best to probe and expose the false ideas in respondent's brief in the order in which they appear in the brief. (This method makes for disjointed although precise reading. The heart of the matter is at pp. 5-12, *infra*.)

Matters Requiring Reply

At pages 2-4, respondent changes petitioner's two questions into three irrelevant and obviously improper questions upon which to base a petition for certiorari.

Petitioner's first question still concerns the power of the District Court to require a party to waive its right of trial by jury as a condition to permitting that party to intervene. Obviously as the intervention rule does not grant the District Court any power to take from litigants their constitutional rights, they can have none, as no such right will be implied. Respondent's proposed question on this subject will be discussed *infra*.

Petitioner's second question still is whether the Court of Appeals properly applied the "clearly erroneous" rule to the facts of this case. The respondent has taken occasion to divide this point into two separate statements which apparently provide respondent with two vehicles to call petitioner names. These two will be discussed *infra*.

At page 5 respondent commences its "statement of the case" but it does not deny the existence of the facts claimed by petitioner, nor their chronology as set forth at pages 3-10 of the petition. Instead, it recites the following ideas which are irrelevant but tend to impugn petitioner's good faith.

At page 5:

(a) that this suit was for $19,848.25, balance due on lumber used on the job. This statement merely lumps three separate contracts of sale for different lumber requirements, two of which contracts are not used in dispute.

(b) "that the lumber was used on the job" does not deny that petitioner used the lumber after it had refabricated the lumber, which is the dispute.

(c) the amount petitioner got from the government is evidence of its own fulfillment of the contract. The idea that plaintiff should be paid because petitioner was paid is a non-sequitor.

(d) Similarly, that petitioner completed its job without delay does not absolve respondent from liability for its own delay.

At page 6 (a) plaintiff's (respondent's) profit of about $1,500 has nothing to do with its responsibility for delivery of the lumber according to the terms of the contract.

(b) Extensions of time to answer the complaint are said to have been generously spaced overlooks the real fact that respondent wanted to settle this suit, not prosecute it, and that it had started the suit against the Massachusetts Bonding and Insurance Company, the surety on the payment bond under the Miller Act only, and that the extensions of time to answer were granted to that defendant and not to this petitioner and that they were granted for the express purpose of working out a settlement of the action (3s, 4s).

At page 7:

(a) respondent fails to mention that the only pre-trial deposition that was taken before the case was so surreptitiously put on the calendar, was the one taken by respondent pursuant to notice dated October 6, 1960, to the defendant surety, that respondent would take the deposition of the witness Ove Gustavsson who was subpoened by respondent to attend and who attended on the appointed day and gave testimony. The transcript of this deposition was received by defendant's counsel on November 15, 1960 along with a note of issue placing this case on

the calendar, without giving the defendant surety a reasonable opportunity to seek a pre-trial deposition of the plaintiff. An affidavit of non-readiness was duly filed (1s). Defendant's notice to take the pre-trial deposition of respondent was served and filed with the affidavit of non-readiness. The petition to intervene was filed 4 days later on November 25, 1960 (1s). This latter petition was returnable December 8, 1960 and was adjourned at respondent's request to December 22, 1960. In the meantime, on December 16, 1960, a pre-trial conference was held before Judge Bartels, district judge. The motion to intervene was called to the attention of Judge Bartels and he noted it and nevertheless, he marked the case "ready", putting it down for January 19, 1961, to give petitioner sufficient time to intervene.

(b) The inference that Judge Mishler had adopted respondent's argument to refuse a jury trial because such a trial would delay the trial of this case is not borne out by the decision of the court on the motion (8s) nor by the order that was entered thereon (9s), but the fact that the Judge was advised that intervenor would go to trial on any day picked would also set this idea to rest as unsound.

At page 8:

(a) the idea that intervenor participated in pre-trial discovery proceedings and hence, that it waived its right to a jury trial, is based upon the fact the petitioner was directed by court order to appeal for a pre-trial deposition by respondent after having intervened. The reference to page 1803 of the certified record is to the transcript of that pre-trial deposition, which was conducted by respondent for its own preparation for trial.

At pages 8-9:

(a) the respondent claims that this error advanced by petitioner is not the concern of the nation. The short

answer to this is when has the constitutional right of trial by jury ceased to be of national concern?

(b) The respondent claims that petitioner has not shown that its question No. 1 has been decided "in a way in conflict with the applicable decisions of this court or which, perhaps, has not been precisely before this court" overlooks the last mentioned alternative.

(c) Respondent's argument relative to petitioner's so-called delay in intervening justified Judge Mishler's direction to waive a jury is based, in the first instance, upon respondent's own re-phrased first question, which in turn is based upon the premise that petitioner's right to intervene was permissive and not a matter of right.

Petitioner claims that its right to intervene is a matter of right (see pp. 16-18, petition). Petitioner claims that its right is one provided under Rule 24 (a)(2) which reads that one may intervene *as of right*, "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action" (46s). This action was started against the surety only and was to recover the contract price on an alleged contract had with the petitioner. The surety was not a party to the respondent's contract with petitioner, but was separately liable, if at all, under a bond guaranteeing petitioner's performance of its contract with respondent. The respondent's suit was necessarily bottomed upon allegations of its contract with petitioner, its own faithful performance of that contract and the breach of it by petitioner. As petitioner claimed that respondent had breached the contract in various respects causing damage, thus proof of such breach would both defeat the suit and enable petitioner to recover damages by way of counterclaims. As surety, the only defendant in respondent's action, that defendant could, even in the absence of petitioner in the suit, assert respondent's breach of its contract with petitioner as a defense,

Coughran v. *Bigelow*, 164 U. S. 301, 310, but, it could not assert the counterclaims of the petitioner, which were personal to petitioner.

Joyce v. *Cockrill*, 92 Fed. Rep. 838, aff'd 179 U. S. 591.

Yet, petitioner would be bound by the decision in the action even though it had not been a party to the action. See page 16, petition. Consequently, petitioner, as a matter of right, qualified under Rule 24(a)(2) to enter this case against the surety alone. Respondent says, without proof, that petitioner's right to enter this case was permissive only. From this false premise it goes on to argue that there was no showing by petitioner that in requiring the waiver of a jury trial as a condition to intervene, the district judge had abused its discretion. Obviously, if the petitioner has a right to enter this case as a matter of right, there is no need to argue "abuse of discretion". Even so, is not a direction to waive a constitutionally guaranteed right which had been diligently sought and demanded (2s), a rather harsh condition to impose upon the entrance of a party to a litigation? The excuse is advanced that a jury trial would have delayed the trial. But what of petitioner's right to a trial by a jury? The right to an early trial can not be of greater importance then a right guaranteed by the Constitution. In fact, the denial of a trial by jury forced this petitioner into an unconstitutional court, and all proceedings therein were a nullity.

Smyth Sales, Inc. v. *Petroleum Heat and Power, Inc.*, 141 F. (2) 44.

That denial is ground for reversal of the final judgment entered thereafter.

Monolith Portland Midwest Co. v. *Reconstruction Finance Co.*, 240 F. (2) 444;
Sutton v. *Johnson Cotton Co.*, 114 F. (2) 308.

Furthermore, petitioner was not objecting to an early trial. The matter was discussed on the usual pre-trial conference before Judge Bartels on December 16, 1960 who considered the pendency of the motion to intervene and nevertheless, he set the case down for trial for January 19, 1961 (35s). On the argument of the motion to intervene, which was December 22, 1960, petitioner stated it had no objection to going to trial when the case was reached, only let the trial be a jury trial. There is no proof to the contrary. Petitioner could have gone to trial just as early to a jury, as to a judge alone. As a matter of fact the trial was delayed by respondent to March 9, 1961, so that it could undertake further pre-trial depositions of petitioner, as a party. In any event, Rule 24, nowhere states that a right to intervene, whether by permission or as a matter of right, may be conditioned upon the denial of a right of trial to a jury. Doesn't it then follow that even if it were permissive, that the trial court abused its discretion in demanding a waiver of a jury trial as a condition to intervening?

The present claim of respondent that the so-called delay justified the District Court's direction that a jury trial be waived is not only not sound as a matter of law, it is not proven as a matter of fact. As appears from Judge Mishler's order granting intervention on the condition in question, the papers used by the judge on the motion was the petitioner's affidavit of September 6, 1960, an affidavit by counsel for respondent dated December 14, 1960 and an affidavit of counsel for petitioner dated December 20, 1960 (9s). This last affidavit only is reproduced in the petition at 3s-8s inclusive. The respondent says now that there were no settlement talks going on between the commencement of this action in April and the filing of the answer by the surety, the only defendant, on August 30, 1960. The affidavit in reply dated December 20, 1960 states that the reasons for the time spent before answering were the many efforts made to settle this litigation. The affi-

davit remains uncontradicted. This was not because respondent had no opportunity to contradict the statements in that affidavit, but because the facts there stated were true and respondent could not contradict them. Rather, emphasis was placed by respondents on the delay that would be encountered in the future by the transfer of this case to the jury calendar. This is made clear by respondent, at page 12 of its brief in this court. As stated above, petitioner was entering a case set down for trial for January 19, 1961, it could not expect an adjournment and it did not request an adjournment on the trial. It did ask that the trial be to a jury rather than to the court alone. Judge Mishler's only comment was that a judge could better try a case as this. He reserved decision and made the decision appearing at 8s.

At pages 11-12, respondent says that because the surety had waived a jury trial, the petitioner also waived it. This claim is based upon the premise that the attorney for the two parties was the same. Each party's rights to a jury trial are guaranteed to them personally, and no waiver can be spelled out unless it is brought home to the party against whom the waiver is claimed. The fact that two parties employ the same lawyer and that the defenses of those two parties are the same (nothing is stated about the appearance of the counterclaims in favor of the petitioner, which were adopted by the surety as an offset), does not make the waiver of one of the parties binding upon the other. Indeed, in this case, the surety's waiver of a jury trial was by default in demanding it and before petitioner entered the case. A jury trial is the right of every party to an action so long as it is one of the actions in which the Constitution preserves the right.

Hanson v. *Safeway Stores* (9 C. A., 1956), 238 F. (2) 336, 339;
Oklahoma Contracting Co. Inc. v. *Magnolia Pipe Line Co.* (5 C. A., 1954), 195 F. (2) 391, 396.

Just how the employment of a lawyer in common by these parties would create a waiver of a jury trial is not explained and of course, it can't be explained. It is obvious that the facts of the case decide the rights of the parties. Consequently, the arguments advanced by respondents actually point up the just need of a writ by this Court to inquire into the facts leading to the decision directing the waiver of a jury trial.

At pages 13-14:

(a) respondent argues that there was a waiver and not a direction to waive, because no appeal was taken from Judge Mishler's order directing the waiver but that there was an acceptance by intervening and participating in subsequent events. In the first place the order insofar as it directed the waiver of a jury trial was not appealable.

City of Morgantown v. *Royal Ins. Co.* (1948), 327 U. S. 254;
Zalzneck v. *Sims; et al.* (6 C. A., 1957), 248 F. (2) 952;
Black v. *Boyd* (6th C. A., 1957), 248 F. (2) 156, 159.

The court in *Black* v. *Boyd, supra,* said at page 159 "The order denying jury trial is interlocutory and not appealable, although it is subject to Appellate review after a final judgment is entered."

In so holding, the court relied upon this court's decision in *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, stating that it was the policy of Congress to limit appeals to final judgments. Hence, petitioner had the right to await the final judgment in the case before appealing from the direction to waive a jury trial. Furthermore, the waiver which was actually filed by petitioner put respondent on notice that an appeal from that order would be taken (10s). The

respondent could have agreed to a jury trial anyway, if it wanted to, but it did not. Apparently, it preferred to rely upon the correctness of Judge Mishler's order. Consequently, if upon a test of that order, it is found unconstitutional, shouldn't respondent assume the responsibility for its lack of effectiveness?

(b) The two cases cited by respondent at page 14 for the proposition that a jury trial was waived by the petitioner's participation in subsequent proceedings apply to equity cases and not to cases, as here, for the ordinary breach of contract seeking money damages.

(c) The further argument of respondent that the petitioner did not demand a jury after it had become a party and that such failure constitutes a waiver is obviously false as the petitioner was under order of the Court to waive the jury trial and a later demand for a jury trial would have been ground for complaint from respondent.

The foregoing comments also answer respondent's Point 2 beginning at page 15 of its brief. It is respectfully submitted that the two cases cited at page 15 and the two at page 16 are not appropriate to the facts of this case at all.

At page 17 respondent calls this a private dispute. This court is better able to judge whether an invasion of a constitutional right is a private dispute or one in which the American public has a stake. Especially, in this day and age, where the most important difference between our system of government and the Soviets, is our judicial system which begnignly imposes upon all Americans, a rule by law rather than by fiat or a ruling personality or clique, and the singular strength of that rule by law is to be found in the constitutionally guaranteed right of trial by jury.

At pages 17 to 19, respondent argues that no "conflict" appears in the second of petitioner's questions discussing the duty of a Court of Appeals to examine the whole record upon an appeal where the appellant complains that

the trial court, without a jury, overlooked uncontradicted or admitted evidence and hence that upon the whole evidence the Court of Appeals would be left with the firm conviction that a mistake had been committed. However, respondent does not argue the matters presented by petitioner. Instead it calls names and repeats the vile language used by the courts below to attack the credibility of petitioner's evidence. That there was no ground for this violent language by the courts below would be apparent, if appellant's claims were true, that there was admitted or uncontradicted facts controlling to the decisions and that the facts are in the record and were overlooked by the trier of the facts. Why didn't respondent argue against the fact dissertion of the petition? Instead, the distractive arguments of the respondent are reduced to restating the claims of the courts below that they did not have to credit as true, the evidence of the petitioner in support of its counterclaims. What about petitioner's claims that there was no proof of respondent's cause of action? Petitioner's main contention is and has been that the facts are uncontradicted or are conceded that respondent's case lacked proof of performance according to the terms of the contract. This failure of proof was documented to the Court of Appeals by proper citation to the record. See pages 23-32 of the petition. All the vile remarks of the courts below have to do with petitioner's counterclaims, not with respondent's *prima facie* case. Yet, it was respondent who had commenced this suit and who had pleaded a contract of sale, a performance of that contract as modified, and the breach by a failure to pay the contract price. It is basic that respondent's proofs should have included performance according to contract terms. That the courts below overlooked this is obvious, they say nothing about it but the trier of the facts said that petitioner failed in its proof of *non-performance* and the Court of Appeals repeated that error. Actually, this court will find upon an inspection of the record that the decision is contrary to law.

Consequently, it is argued, here, that this court ought to instruct the Court of Appeals, generally, that they should examine the case on the whole evidence, when the essential facts of the case have been overlooked by the trier of the facts, to ascertain whether or not, in their opinion, a mistake was made.

WHEREFORE petitioner prays that a writ of certiorari be issued on one or the other of the questions presented by petitioner or on both of them.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney for Petitioner.